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Nos. 91-1111, 91-1128

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

Hartford Fire Insurance Co., et al.; Merrett Underwriting Agency Management Ltd., et al.,
Petitioners,

v.

State of California, et al.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE GOVERNMENT OF CANADA AS AMICUS CURIAE IN SUPPORT OF CERTAIN PETITIONERS*

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This amicus brief is submitted in support of Petitioners Merrett Underwriting Agency Management Limited, Three Quays Underwriting Management Limited, Janson Green Management Limited, Murray Lawrence & Partners, D.P. Mann Underwriting Agency Limited, Robin A.G. Jackson, Peter N. Miller, Edwards & Payne (Underwriting Agencies) Limited, and Sturge Reinsurance Syndicate Management Limited.

QUESTION PRESENTED

Did the Court of Appeals properly assess the extraterritorial reach of the Sherman Act consistent with precedents and international law when it held that a U.S. district court should apply U.S. law to reach and punish the conduct of foreign participants in a foreign reinsurance market acting legally pursuant to authority of the local sovereign but contrary to U.S. law?

PARTIES TO THE PROCEEDING

This case involves complaints by nineteen states and numerous private plaintiffs that were consolidated for pretrial purposes by the judicial Panel on Multi-District Litigation in MDL Docket No. 767.

Plaintiffs in the consolidated proceeding, who were also appellants in the Court of Appeals for the Ninth Circuit, were:

States: The States of Alabama, Alaska, Arizona, California, Colorado, Connecticut, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Montana, New Jersey, New York, Ohio, Pennsylvania, Washington, West Virginia, and Wisconsin.

State or Local Government Entities, Listed by State:

Alabama: City of Mobile; City of Birmingham.

California: City of Lafayette; City and County of San Francisco; County of San Benito.

Louisiana: City of Baton Rouge; City of New Orleans; City of Slidell; City of Nachitoches; City of Eunice.

Massachusetts: Town of Hanover; Town of Milford.

Montana: County of Teton.

New York: Roosevelt Island Operating Authority, Inc., Village of Croton; Village of Lake Success.

Ohio: Township of Jackson; County of Hardin.

Pennsylvania: County of Schuylkill; City of Altoona; City of York; Borough of Chambersburg.

Washington: County of Crowlitz.

West Virginia: City of Clay; County of Hancock; County of Mineral; County of Wirt.

Private Plaintiffs: Big D Building Supply Corp.; Anastasios Markos, T/A Municipal Exxon; Bay Harbor Park Homeowners Ass'n, Inc.; Environmental Aviation Sciences, Inc.; Carlisle Day Care Center, Inc.; Bensalem Township Authority; Keyboard Communications, Inc.; Glabman Paramount Furniture Mfg. Co., Inc.; Les-Ray Bobcat, Inc.; Jerry Grant Chemical Associates, Inc.; Durawood, Inc.; Carmella M. "Boots" Liberto Trading as R.J. Liberto, Inc.; Henry L. Rosenfeld; Acme Corrugated Box Co., Inc.; P&J Casting Corp.; Ace Check Cashing, Inc.

Defendants in the consolidated proceeding, who were also appellees in the Ninth Circuit, were, beside Petitioners, the following:

Allstate Insurance Company; Aetna Casualty & Surety Company; CIGNA Corporation; General Reinsurance Corporation; Hartford Fire Insurance Company; Insurance Company of North America; Insurance Services Office, Inc.; Reinsurance Association of America; Thomas A. Greene & Company, Inc.; Ballantyne, McKean & Sullivan Limited; C.J.W. (Underwriting Agencies) Limited (sued herein as C.J. Warrilow-Hine & Butcher, Ltd.); Lambert Brothers (Underwriting Agencies) Limited (sued herein as J. Brian Hose & Others, Ltd.); R.K. Carvill & Co., Ltd; Continental Reinsurance Corporation (U.K.) Limited; Unionamerica Insurance Company, Ltd.; CNA Re (U.K.), Ltd.; Kemper Reinsurance London, Ltd.; Constitution Reinsurance Corporation; Mercantile & General Reinsurance Company of America; Prudential Reinsurance Company; North America Reinsurance Company; Winterthur Swiss Insurance Company; Excess Insurance Company, Ltd.; Excess Insurance Group, Ltd.; Terra Nova Insurance Company Limited.

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BRIEF OF THE GOVERNMENT OF CANADA AS AMICUS CURIAE IN SUPPORT OF CERTAIN PETITIONERS

THE INTEREST OF THE GOVERNMENT OF CANADA

The Government of Canada is submitting this brief* in support of certain named petitioners in *Merrett Underwriting Limited et al. v. State of California et al.* because the law as found in the decision below threatens important and legitimate Canadian legal, commercial and economic interests. In particular, Canada is concerned with the exercise of U.S. extraterritorial jurisdiction where it directly conflicts with the exercise of Canada's territorial jurisdiction.

*Pursuant to Rule 37 of this Court, the parties have supplied written consents to the filing of this brief. The consents are filed with the Clerk of the Supreme Court.

Canada relies on the amicus curiae brief of the Government of the United Kingdom to address other Canadian difficulties with the balancing procedure undertaken by the Ninth Circuit. In particular, Canada is concerned that the holding relating to the significance of certain parties being British subsidiaries of U.S. corporations is contrary to U.S. and international law, which provides that a corporation is a national of the country of its organization.

Although the question presented refers to the proper assessment of the extraterritorial reach of the Sherman Act, consistent with U.S. precedents and with relevant principles of international law, Canada's concern does not arise solely in the field of antitrust. Relatively recent decisions by lower U.S. courts, not reviewed by this Court, have adversely affected Canadian interests in several fields by imposing U.S. law on Canadian citizens for conduct within Canada despite the fact that Canadian authorities had either approved or directed contrary conduct, or had exercised what the Government of Canada deemed to be exclusive Canadian regulatory jurisdiction. The decision of the Court of Appeals for the Ninth Circuit in *Merrett Underwriting Agency Management Limited et al. v. State of California et al.* could lead to further adverse effects in other areas of economic activity.

Canada's concern does not lie with the tradition in U.S. antitrust enforcement whereby U.S. jurisdiction reaches some persons and conduct that are extraterritorial to the United States. Where Canadian law and policy applied in Canada are compatible with U.S. extraterritorial enforcement, no conflict need arise. Both Canada and the United States are committed to a policy of generally promoting competition and consumer welfare.

In view of the extensive economic links between our two countries, the Government of Canada has an interest in the application of the laws of the United States in a manner consistent with relevant principles of international law. Canada, like the United States, has a long-standing interest in the development and application of international law. The Government of Canada may be able to assist this Court, as it reviews the

decisions below, in its consideration of the relevance of customary international law to what appears to Canada, respectfully, as a clear embodiment of these principles in U.S. law.

STATEMENT OF FACTS

The Government of Canada is submitting this amicus brief with respect to only one of the two cases the Court has decided to hear, *Merrett Underwriting Agency Management Limited et al. v. State of California et al.* ("*Merrett*"). As more fully explained in the Statement of Facts by the Government of the United Kingdom in its brief amicus curiae, Petitioners in *Merrett* ("Petitioners") are participants in reinsurance and retrocessional reinsurance markets in England. Petitioners are here seeking to overturn only three of about a dozen claims brought against some or all of them for alleged anticompetitive conduct undertaken virtually exclusively in the United Kingdom. No view is expressed on the law or merits of these remaining claims. Unlike the other claims asserted, which involve both U.S. and English defendants, these claims involve *only* English defendants, the Petitioners.

Under these three claims, Petitioners are alleged to have agreed to restrict the scope of reinsurance and retrocessional reinsurance written in England, primarily in the Lloyds market, and to have further agreed to refuse to offer such reinsurance for policies insuring certain identified unacceptably high risks in the United States.[1] Respondents allege that these agreements, whatever their business justification and whatever the delegation of authority under English law to these Petitioners to pursue these commercial goals, are violations of Section 1 of the Sherman Act. For purposes of this Court's review of a summary judgment motion, Respondents' claims must be deemed to be

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1. For the purposes of this appeal, the Government of Canada takes as given Judge Schwarzer's conclusion that the London reinsurance markets have a direct and substantial interest in maintaining their financial viability, which is at risk, as a part of the framework of English reinsurance market regulation by collectively limiting the overseas risks which their members assume pursuant to authority delegated by the Parliament of England. *In Re Insurance Antitrust Litigation*, 723 F. Supp. 464, 490 (N.D. Cal. 1989).

true. The Government of Canada takes no position as to whether these claims are factually correct or whether other relevant facts might be adduced if this litigation proceeded.

The district court declined to exercise jurisdiction over these three claims against Petitioners based on considerations of international comity. The district court recognized that Petitioners are foreign participants in a foreign market governed by the laws and traditions of a foreign sovereign, and concluded that:

> enforcement of the antitrust laws against activities in the London reinsurance market would lead to significant conflict with English law and policy. This conflict, unless outweighed by other factors in the comity analysis, is itself sufficient reason to decline the exercise of jurisdiction.

Id. at 489. After considering the other factors in a comity analysis, the district court concluded that this conflict precluded the exercise of U.S. antitrust jurisdiction.

When these claims were appealed to the Court of Appeals for the Ninth Circuit, the British Government formally notified the Ninth Circuit of this direct conflict in an amicus brief. In its opinion, the Ninth Circuit recognized that:

> [t]he district court found that application of the antitrust laws to the London reinsurance market "would lead to significant conflict with English law and policy. " The British [Government's *amicus curiae*] brief reiterates that conclusion: we do not doubt its accuracy.

In Re Insurance Antitrust Litigation, 938 F.2d 919, 933 (9th Cir. 1991) (citation omitted). Nonetheless, it reversed the district court's decision. In essence, the Ninth Circuit held that where a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce is shown, not even a direct conflict with the law of a foreign sovereign operating in its own territory can overcome the presumption of U.S. antitrust jurisdiction. *Id.*

SUMMARY OF ARGUMENT

Established United States law follows and applies international law and should lead to reversal of the decision below. No

comity balancing analysis is required. Absent a clearly expressed intent to the contrary, U.S. law follows customary international law in that a state should not apply its economic law to regulate conduct by persons located in a foreign territory where doing so directly conflicts with and undermines the law of the foreign territorial sovereign. This principle is established in international law, is the law of the United States, and has been consistently applied by this Court in several cases involving statutes with jurisdictional clauses analogous to that of the Sherman Act. The Sherman Act, as amended, and 100 years of Supreme Court decisions interpreting it express no intent to depart from this principle. Repudiating it here would be an unwarranted departure from an unbroken tradition of jurisprudence in the Supreme Court of the United States and in other major states. Following this tradition preserves the extraterritorial application of U.S. antitrust law, or the effects doctrine generally, except where to do so is to undercut the ability of another sovereign state to regulate conduct in its own territory.

ARGUMENT

I. CUSTOMARY INTERNATIONAL LAW, WHICH HAS BEEN ADOPTED AS U.S. LAW, PRECLUDES ONE STATE'S EXERCISE OF ECONOMIC REGULATORY JURISDICTION OVER ACTS OCCURRING IN THE TERRITORY OF ANOTHER STATE WHERE SUCH EXERCISE WOULD CAUSE A SUBSTANTIAL CONFLICT.

A. International Law is a Part of U.S. Domestic Law.

International law is the law of the United States. *The Paquete Habana*, 175 U.S. 677, 700-02 (1900).[2]

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2. "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination." *See generally*, Henkin, "International Law as Law in the United States," 82 Mich. L. Rev. 1555, 1561–67 (1984). Customary international law is also part of Canadian law. *Ref. Re Exemption of U.S. Forces from Canadian Criminal Courts*, [1943] S.C.R. 483 (S.C.C.) at 516, per Taschereau J. Other sovereigns similarly incorporate international law into domestic law. *Triquet v. Bath* [1764] 3 Burr 1478; 97 E.R. 936 (K.B.) at 938 *per* Lord Mansfield C.J.; *Trendex Trading Corporation v. Central Bank of Nigeria* [1977] QB 529, 554,

B. As a Matter of Customary International Law, States do not Apply Their Economic Regulatory Laws to Acts Committed by Foreign Persons Within the Territory of a Foreign Sovereign Where Such Application Would Conflict With the Laws of the Foreign Sovereign.

Customary international law[3] confers a general principle of territorial preference in cases of conflicting concurrent jurisdiction between one sovereign applying its law within its territory and another sovereign applying its law extraterritorially to command conduct within the other state's borders ("The Territorial Preference").[4]

The United States recognizes both sovereign equality and, correspondingly, The Territorial Preference. For example, in

NOTES *(Continued)*

per Lord Denning MR (C.A.); Basic Law (*Grundgesetz*) of Germany, Article 25; Article 10 of the Italian Constitution of 27 December 1947. *See generally*, F. Morgenstern, "Judicial Practice and the Supremacy of International Law," [1950] 27 BYBIL 42, 61 (discussing supremacy of international law in France, Switzerland, Greece, the Netherlands, Belgium, Denmark and Austria.)

3. International law is derived generally from the following sources:

(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

(b) international custom, as evidence of a general practice accepted as law;

(c) the general principles of law recognized by civilized nations;

(d) . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Article 38(1) of the Statute of the International Court of Justice. Customary international law is evidenced by state statutes and practice, official statements of policy, and the works of eminent jurists and commentators. *The Paquette Habana*, 175 U.S. 677, 700–02 (1900). State practice attains the level of customary international law where it is followed out of a sense of legal obligation (*opinion juris sive necessitatis*). *Asylum Case (Columbia v. Peru)*, [1950] I.C.J. Rep. 266, 277.

4. *See, e.g.*, I. Brownlie, *Principles of Public International Law* 287 (4th ed. 1990) ("The sovereignty and equality of states represents the basic constitutional doctrine of the law of nations . . . . The principal corollaries of the sovereignty and equality of states are: (1) a jurisdiction, *prima facie* exclusive, over a territory . . . ; (2) a duty of non-intervention in the area of exclusive jurisdiction of other states . . .").

The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 136 (1812), this Court recognized the "perfect equality and absolute independence of sovereigns." Similarly, in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964), this Court noted that "the concept of territorial sovereignty is so deep seated, [that] any state may resent the refusal of the courts of another sovereign to accord validity to acts within its territorial borders."[5]

Following customary international law, Canadian courts do not generally apply Canadian or provincial law where application would displace or undermine the laws or established policies of another state or province effective within the latter's territory. *See, e.g., Frischke et al. v. Royal Bank of Canada et al.* [1977], 80 D.L.R. (3d) 393 at 404 (Ontario C.A.) (courts should not take such action as would cause violation of the laws, or circumvention of the procedures, of a friendly nation). Judicial decisions and official statements in the United Kingdom, Australia, Sweden, Switzerland, Germany, France, and the Netherlands, constituting state practice and accepted as a

5. When the United States has failed in the past to comply with The Territorial Preference, foreign states have protested the U.S. action. For example, in response to the U.S. extraterritorial application of Siberian pipeline trade controls, the foreign ministers of the twelve European Communities Member States responded, "This action, taken without consultation with the Community, implies extraterritorial extension of US jurisdiction, which in the circumstances is contrary to international law." *The Extraterritorial Application of National Laws* 19 (Lange & Born, eds. 1987), *citing* Statement of the Foreign Ministers of the European Communities, 23 June 1982. *See also* Diplomatic Note from the Canadian Embassy to the U.S. Department of State dated July 7, 1982 regarding the Siberian pipeline trade controls (noting that the U.S. assertion of jurisdiction in that case was "incompatible with the principles of self-restraint and non-interference that underlie the international order."); Comments of the European Community on the Amendments of 23 June 1992 to United States Export Administration Regulations, *reprinted in* A.V. Lowe, *Extraterritorial Jurisdiction* 200, 201 (1983). ("The United States measures as they apply in the present case are unacceptable under international law because of their extraterritorial aspects."). These concerns are not with U.S. extraterritoriality generally. The EC applies its competition law to reach foreign conduct by foreign parents of EC subsidiaries. *See In re Wood Pulp Cartel: Ahlström Osakeyhtio v. EC Commission* [1988] 4 C.M.L.R. 901 (EC Court of Justice).

matter of obligation, reveal that these states also recognize The Territorial Preference.[6]

6. The following are supporting precedent in these jurisdictions:

United Kingdom: *A.M. Luther v. James Sagor & Co.*, [1921] 3 K.B. 532 at 548 (C.A.) ("It is well settled that the validity of the acts of an independent sovereign government in relation to property and persons within its jurisdiction cannot be questioned in the Courts of this country"); *In re Westinghouse Uranium Contract*, [1978] A.C. 547 (Judicial Committee of the Privy Council) (letters rogatory by U.S. court not given effect to extent they conflicted with British and EC law); *British Nylon Spinners, Ltd. v. Imperial Chemical Industries, Ltd.*, [1952] 2 All E.R. 780 (C.A.), (court would not recognize and enforce U.S. court order where to do so "would destroy or qualify those statutory rights belonging to an English national" who was not subject to U.S. jurisdiction).

Australia: *The Jumbunna Coal Mine No Liability v. The Victorian Coal Miners' Association*, [1908] 6 Commonwealth Law Reports 309 at 363 (High Court of Australia) (statutes "are always read as being *prima facie* restricted in their operation within territorial limits").

Sweden: 1979 Swedish Act on Prohibition of Investments in South Africa and Namibia, Swed. Stat. 1979: 487; Swedish Ministry of Commerce, Prohibitions of Investments in South Africa and Namibia 50 (1979) ("In the event of collisions of laws, however, the basic principle, according to international law, must be not to coerce one's own legal subjects, when they are under the territorial jurisdiction of a foreign state, to actions incompatible with the legal system of that state.").

Switzerland: *Hachette Booksellers S.A. et al. v. Cooperative Buying and Distribution Assoc. of Tobacco and Newspaper Merchants et al.*, [1967] Arrêts du Tribunal Fédéral 93 II 192 (Supreme Court of Switzerland) (Federal cartel act limited to Swiss territory).

Germany: Brief Amicus Curiae of the Federal Republic of Germany, *Sterling Drug Inc. v. Bayer AG, et al.*, Nos. 92-7920 and 92-7970, 8 (2nd Cir., filed Oct. 29, 1992) ("The extraterritorial aspects of the [trademark and trade name] Injunction constitute a substantial and unwarranted interference with Germany's sovereign right to regulate activities within its territory.")

C. A Corollary Canon of Construction is That Absent a Clearly Expressed Intent to Override International Law, a Statute Should not be Construed To Do So.

Framed by international law, the corresponding canon of construction in the United States is that "an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains". *Alexander Murray v. Schooner Charming Betsy*, 6 U.S. 64, 116, 2 Cranch 64, 118 (1804) (Marshall, C.J.).

Canadian courts also construe statutes, if another reading is possible, not to violate international law. *See, e.g., Daniels v. White and The Queen*, [1968] S.C.R. 517, 541 (Supreme Court of Canada) *per* Pigeon J.; P-A Côté, *The Interpretation of Legislation in Canada* 308-09 (2d ed., 1991). The United Kingdom, as well as many other states, also follow this rule. *See, e.g., Mortensen v. Peters* [1906] 43 Scottish Law Reporter 872, 877 (Scottish Court of Justiciary) *per* Lord Kyllachy.

Statutes and treaties manifesting clear Congressional intent to override international law are the only exceptions to this rule. *See Diggs v. Shultz*, 470 F.2d 461 (D.C. Cir. 1972), *cert. denied*, 411 U.S. 931 (1973) (upholding statute permitting imports contrary to United Nations Security Council embargo). *Accord, United States v. Alvarez-Machain*, ___ U.S. ___ , 112 S. Ct. 2188 (1992) (treaty terms do not necessarily embody customary international law); *Société Nationale Industrielle Aerospatiale v. U.S. Dist. Court S.D. Iowa*, 482 U.S. 522 (1987) (construing the

France: *Société Fruehauf Corporation v. Massardy et autres*, [1968] Recueil Dalloz Sirey-Jurisprudence 147; Gazette du Palais 1965.2.86 (Court of Appeal, Paris), *translated in* Andreas Lowenfeld, *Trade Controls for Political Ends* 93 (1983); *id.* at 99 (general principles of international law dictated that French company in France not subject to extraterritorially applied U.S. trade laws).

Netherlands: *Compagnie Europeene des Petroles S.A. v. Sensor Nederland B.V.*, 22 I.L.M. 66 (Hague Dist. Ct. 17 Sept. 1982) (extraterritorial scope of U.S. Siberian pipeline regulations to countermand law and policy in the Netherlands incompatible with territorial principle under international law).

Hague Evidence Convention as permitting a court not to employ the Convention before seeking and compelling discovery under the Federal Rules of Civil Procedure).

This exception is followed not only in the United States but in other jurisdictions as well. *See, e.g., Gordon v. Regina in Right of Canada*, [1980] 5 W.W.R. 668, 671 (British Columbia Supreme Court), *aff'd* [1980] 6 W.W.R. 519 (British Columbia C.A.) (upholding jurisdiction over U.S. citizen fishing in 200-mile Canadian "fishing zone." "[E]ven if the law of Canada contravenes 'customary international law,' if Parliament, as here, has acted unambiguously, the courts of this country are bound to apply the domestic law.") See also *Mortensen v. Peters*, 43 Scottish Law Reporter 872, 877 (Scottish Court of Justiciary) (for expression of same exception in U.K jurisprudence).

D. This Court has Consistently Applied These Principles to Read Statutes With Jurisdictional Clauses Comparable to the Sherman Act to Respect The Territorial Preference.

A second, and related, canon is that statutes should not be construed to apply extraterritorially to conflict with foreign local law, absent a clearly expressed legislative purpose to the contrary. This is not only the law in the United States,[7] but in such other states as Canada and the United Kingdom.[8]

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7. *Foley Bros. v. Filardo*, 336 U.S. 281, 286 (1949) (refusing to apply the U.S. Eight Hour Law to a contract between the United States and a private contractor for construction work in the Middle East because Congress had not expressed a clear purpose to regulate labor conditions which are the primary concern of foreign jurisdictions).

8. For Canadian law *see, e.g.*, Driedger, *The Construction of Statutes* 166 (1974) ("There is a presumption that, in the absence of an intention clearly expressed or to be inferred from its language, or from the object or subject matter or history of the enactment, a legislature does not design its statutes to operate extraterritorially."); P-A Côté, *The Interpretation of Legislation in Canada* 170 (2d ed. 1991) ("Unless it is implicitly or explicitly provided otherwise, the legislator is presumed to enact for persons, property, judicial acts and events within the territorial boundaries of his jurisdiction."). For U.K. law *see, e.g., Regina v. Keyn*, [1876], 2 Ex.D. 63 (unless express assertion of authority otherwise, jurisdiction is territorial); F.A.R. Bennion, *Statutory Interpretation*, § 130 at 263 (2d ed. 1992) ("Unless the contrary intention appears, and subject to any relevant rules of private international law, an enactment is taken not to apply to foreigners and foreign matters outside the territory to which it extends."); P. St. J. Langen, *Maxwell on the Interpretation of Statutes* 171 (12th ed. 1969) ("In the absence of an intention clearly expressed or inferred either from its language, or from the object or subject-matter or history of the enactment, the presumption is that Parliament does not design its statutes to operate on its subject beyond the territorial limits of the United Kingdom.")

This principle has been consistently applied in the United States to statutes having jurisdictional clauses similar to that of the Sherman Act. It limits the jurisdiction of those statutes over foreign conduct by U.S. and foreign persons which could cause conflict between sovereign regulatory regimes.

In *McCulloch v. Sociedad Nacional*, 372 U.S. 10 (1963), this Court refused to construe the words "between any foreign country and any State, Territory or the District of Columbia" (*i.e.*, foreign commerce) in the National Labor Relations Act ("NLRA") to extend to the maritime operations of foreign flagships employing a foreign crew, even though the Honduran corporation which operated the ships was controlled by the United Fruit Company, a New Jersey corporation, owned by U.S. citizens, and the ships transported fruit between Central and South America and the United States. The Court specifically recognized the "possibility of international discord" that could result from the concurrent, and possibly contradictory, application of the NLRA and the Honduran Labor Code. The Court concluded that in order "to sanction the exercise of local sovereignty under such conditions in this 'delicate field of international relations there must be present the affirmative intention of Congress clearly expressed.'"[9]

Last year, this Court once again affirmed this "clear expression" rule in *E.E.O.C. v. Arabian American Oil Co.* ("*Aramco*"), ____ U.S. ____, 111 S.Ct. 1227 (1991) (Title VII of the Civil Rights Act of 1964 held not to apply extraterritorially to regulate the employment practices of U.S. employers who

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9. *Id.* at 21–22, *quoting Benz v. Compania Naviera Hidalgo S.A.*, 353 U.S. 138, 147 (1957) (holding that the Labor Management Relations Act of 1947 did not apply to the picketing of a foreign ship operated entirely by foreign seamen under foreign articles while the vessel was temporarily berthed in a U.S. port, absent a clear expression of legislative intent.)

employ U.S. citizens abroad). Although the potential conflict between the concurrent application of both U.S. and Saudi employment law was not specifically addressed, the Court did recognize that the purpose of the "clear expression" rule was "to protect against unintended clashes between our laws and those of other nations. . . ." *Id.* at 1230.

Title VII defined "commerce" as including commerce "between a State and *any place outside thereof*." *Id.* at 1232 (emphasis supplied). Although Title VII's definition of "commerce" was different from but no less broad than the Sherman Act's reference to "foreign commerce," the Court held that it was insufficient to prove that Congress intended the statute to apply to employers outside the United States. The Court further noted that it had "repeatedly" held that even statutes that expressly refer to *foreign* commerce do not necessarily apply abroad.[10]

10. *Id.* at 1232, *citing New York Central R.R. Co., v. Chisholm*, 268 U.S. 29 (1925) (refusing to construe the words "foreign commerce" to permit the estate of a U.S. employee to recover under the Federal Employers Liability Act from a U.S. railroad company for damages resulting from a railroad accident which occurred 30 miles north of the Canada-United States border). *Accord Lujan v. Defenders of Wildlife,* —— U.S. ——, 112 S.Ct. 2130, 2147 (1992) (Stevens, J., concurring in judgment, concluded that Section 7(a)(2) of the Endangered Species Act did not apply extraterritorially, because there was no clear indication that the provision was intended to apply in foreign jursidictions.)

The *Aramco* Court reconciled its holdings in *Chisholm* and *McCulloch* with *Steele v. Bulova Watch Co.*, 344 U.S. 280, 286–87 (1952). In *Steele*, the Court found that far broader language – "all commerce which may lawfully be regulated by Congress" – justified the application of the Lanham Act to foreign conduct. The Court in *Steele* also specifically noted that, given the fact that Mexican courts had nullified defendant's Mexican Bulova trademark registration, application of the Lanham Act would not "impugn foreign law" or cause an "interference with the sovereignty of another nation." *Steele*, 344 U.S. at 289.

II. NEITHER THE PLAIN LANGUAGE NOR THE LEGISLATIVE HISTORY OF THE SHERMAN ACT DEMONSTRATES A CONGRESSIONAL INTENT TO APPLY IT EXTRATERRITORIALLY SO AS TO CONFLICT WITH AND UNDERMINE ANOTHER SOVEREIGN'S TERRITORIAL LAWS.

Like the NLRA and Title VII, the plain language and the legislative history of the Sherman Act manifest no Congressional intent to apply it to conduct regulated by a foreign sovereign within its territory, where to do so would undermine the foreign sovereign's laws.

Section 1 of the Sherman Act declares illegal contracts, combinations or conspiracies, "in restraint of trade or commerce among the several States, or *with foreign nations*." 15 U.S.C. § 1 (emphasis supplied). This language is no broader than that read with restraint in *Aramco, Chisholm,* and *McCulloch*. This, to many, should be sufficient to put an end to the issue of possible contrary legislative construction.

If one needs to look further, to the legislative history of the Sherman Act, one can question whether the Sherman Act was in fact intended to be applied extraterritorially at all. Congress cannot, however, be said to have shown any indication of an intent to override The Territorial Preference.[11]

11. None of the drafters of the Sherman Act suggested that it applied to conduct outside the territory of the United States regulated by the conflicting law or policy of another sovereign state. Senator George of Mississippi, one of the principals in the debate, was concerned that the Sherman Bill could permit wholesale evasion if it did not apply to agreements made outside the territory of the United States: "If the [anticompetitive] agreement be not made within the jurisdiction of the United States, as if it be made in Canada, it is not within the terms of the bill." Senator Sherman agreed that cartels formed outside the United States could not be reached but said the proceeds of those cartels realized within the United States could be. 21 Cong. Rec. 2461 (1890). It thus does not appear that overriding The Territorial Preference ever occurred to either Senators George, Sherman, or indeed to any other legislator responsible for the Act. *Accord, American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909) (which went considerably further and refused to apply the Sherman Act extraterritorially even absent foreign state regulation). *American Banana*, of course, has been substantially overruled as discussed in *W. S. Kirkpatrick v. Environmental Tectonics Corp.*, 493 U.S. 400, 407 (1990) (applying Foreign

Notwithstanding the legislative history, Canada understands that it is almost universally accepted through eighty years of Supreme Court jurisprudence that the plain meaning of foreign commerce in the Sherman Act provides for jurisdiction over foreign persons and some foreign conduct under the effects doctrine. Canada does not object to the assertion of U.S. antitrust jurisdiction to reach foreign conduct under the effects doctrine—so long as there is no conflict between U.S. and foreign local law.

III. NOR DOES THE FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT OF 1982, AMENDING THE SHERMAN ACT, EXPRESS AN INTENT TO OVERRIDE THE TERRITORIAL PREFERENCE IN SITUATIONS OF LEGAL CONFLICT UNDER U.S. AND INTERNATIONAL LAW.

In 1982, Congress amended the jurisdictional provisions of the Sherman Act to promote U.S. exports. The Foreign Trade Antitrust Improvements Act ("FTAIA")[12] exempts from Sherman Act jurisdiction conduct involving trade or commerce with foreign states where there is no direct, substantial and reasonably foreseeable effect on domestic, import or export commerce. 15 U.S.C. § 6a. The FTAIA does not say when U.S. courts do have antitrust jurisdiction, except by negative implication. The FTAIA is therefore similar to the alien exemption provision of Title VII discussed in *Aramco*: it eliminates a portion of the U.S. courts' jurisdiction, but does not increase or clarify the proper scope of the remaining jurisdiction.[13] In fact, the legislative

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Corrupt Practices Act extraterritorially).

12. The FTAIA specifically excludes from its scope conduct involving *import* trade or commerce. Import trade or commerce remains covered by the Act of 1890. The London reinsurance Petitioners were selling reinsurance and retrocessional reinsurance risk protection to U.S. insurance companies located in the United States. This probably constitutes the importation of reinsurance services into the United States.

13. Title VII's alien exemption provision clarified that the statute "shall not apply to an employer with respect to the employment of *aliens* outside any State." 111 S. Ct. at 1233–34 (emphasis supplied). The *Aramco* Court rejected Petitioners' contention that this provision should be construed by negative inference to mean that Congress intended to cover U.S. *citizens* working

history of the FTAIA establishes that Congress did *not* intend to modify the clear expression or any other applicable rule of jurisdictional limitation in determining the scope of Sherman Act jurisdiction in a case of proposed extraterritorial application:

> [T]he bill is intended neither to prevent nor to encourage additional judicial recognition of the special international characteristics of transactions. If a court determines that the requirements for subject matter jurisdiction are met, bill would have no effect on the courts' ability to employ notions of comity, *see, e.g., Timberlane Lumber Co. v. Bank of America*, 549 F.2d 1287 (3rd [sic] Cir. 1979), *or otherwise to take account of the international character of the transaction*.

H.R. Comm. on the Judiciary, H.R. Rep. No. 97-686, 97th Cong., 2d Sess. 13 (1982) (emphasis supplied).

IV. IN THE HUNDRED YEARS OF JURISPRUDENCE FOLLOWING PASSAGE OF THE SHERMAN ACT, THIS COURT HAS NEVER UPHELD SHERMAN ACT JURISDICTION OVER FOREIGN PERSONS ENGAGED IN PREDOMINANTLY FOREIGN CONDUCT WHERE THE EXERCISE OF SUCH JURISDICTION WOULD DIRECTLY CONFLICT WITH THE LOCAL LAWS AND POLICIES OF THE FOREIGN JURISDICTION.

This Court has not until now been presented with the assertion that the Sherman Act can override contrary foreign local law. To date, in the antitrust cases which this Court has considered, either the actors were located or a significant proportion of the conduct at issue occurred in the United States.[14] In those cases in which predominantly foreign actors

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abroad. *Id.*

14. For example, in *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927), the agreement and significant overt acts occurred in the United States. *Id.* at 276. Moreover, the defendants did not claim that the imposition of U.S. antitrust law directly conflicted with Mexican law. *See* Brief of Petitioners, *United States v. Sisal Sales Corp.*, No. 200. Therefore, the Court had no occasion to address the issue of a possible override of The Territorial

and conduct were involved, a possible conflict of the two sovereign states' laws was not addressed.

The leading modern authority, *United States v. Aluminum Co. of America* ("*Alcoa*"), 148 F.2d 416 (2d Cir. 1945), presented no conflict. In *Alcoa*, Judge Hand, writing for a three judge panel hearing the case on certification from the Supreme Court, concluded that alleged combinations between Aluminium Limited, a Canadian company, and European aluminum producers would be unlawful under U.S. antitrust law, even if made abroad, "if they were intended to affect imports and did affect them." *Id.* at 444. If there had been a clear conflict of jurisdiction, however, it is unlikely that Judge Hand would have applied the Sherman Act under his "effects" test. He recognized that Sherman Act jurisdiction should be limited by conflict of laws considerations:

> [I]t is quite true that we are not to read general words, such as those in this Act, without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the "Conflict of Laws."

148 F.2d at 443.

Likewise, in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), this Court found no conflict. In that case, a Canadian Government agency enlisted the Canadian subsidiary of the U.S. firm, Union Carbide, to help the Canadian agency purchase and allocate wartime supplies of a rare metal. The U.S. plaintiff, a competitor of Union Carbide, claimed antitrust injury because Carbide's subsidiary bought none of its metal. As the Court indicated, there was no question of the propriety of exercising U.S. jurisdiction over the Canadian subsidiary because it was not a party to the suit, having never been served. *Id.* at 706. The Court found no jurisdictional limitation: there was no evidence that the Canadian Government had directed or approved of the discriminatory buying practices. There was no communication to the U.S. courts

NOTES *(Continued)*

Preference. *See* Brief of the United States, *United States v. Sisal Sales Corp.*, No. 200 at 27.

declaring a Canadian interest in conflict with U.S. enforcement (in contrast to the British Government's brief here). By implication, if a clear sovereign policy interest were manifested, The Territorial Preference would apply.[15]

V. REPUDIATING THE TERRITORIAL PREFERENCE ABSENT CLEAR LEGISLATIVE DIRECTION TO DO SO COULD INVITE FOREIGN EXTRATERRITORIAL COUNTERMEASURES AGAINST U.S. TERRITORIAL SOVEREIGNTY UNDERMINING IMPORTANT U.S. INTERESTS.

The United States has a vital interest in applying its laws to conduct by persons within its borders. The United States has responded to certain foreign political boycotts by prohibiting United States persons from furnishing boycotting countries with information concerning the race, religion, sex, or national origin of any other United States person. Export Administration Act, 50 U.S.C. App. § 2407 et seq. (1988). Would the United States not consider it a serious infringement of law if a boycotting country attempted to seize and prosecute a resident in the

15. Nor can it have mattered if the Canadian Government had instructed an official of the Canadian subsidiary to buy only from Union Carbide and had communicated this instruction while the subsidiary's official was on a buying trip in Colorado. Limited ministerial acts in the United States would not, in this circumstance, confer U.S. jurisdiction.

Canada agrees with the United States Solicitor General that a statement to the Court by a friendly foreign sovereign should be given dispositive weight in determining whether conduct was mandated by the sovereign in accordance with its laws. Brief for the United States as Amicus Curiae in Support of Petition for Certiorari in *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, No. 83-2004 at 17. It should be equally dispositive if the foreign sovereign asserts that there is a jurisdictional conflict, short of mutually incompatible complusion. For example, where there is a governmental request, or the establishement of a scheme of regulation requiring primacy of territorial jurisdiction, the statement by the foreign sovereign should suffice. *See* J.S. Stanford, (then Director General, Bureau of Commercial and Commodity Relations, External Affairs of the Government of Canada, now Canadian Deputy Solicitory General, speaking in his private capacity), "The Application of the Sherman Act to Conduct Outside the United States: A View From Abroad," 11 Cornell Int'l L.J. 195, 203 (1978) (a limited interpretation of the defense of foreign compulsion "seems to place the government of free enterprise economies at a disadvantage in relation to governments that practice a more interventionist policy").

United States complying with this U.S. law? Repudiation of The Territorial Preference, it would appear, threatens U.S. interests in effectively governing sovereign U.S. territory no less than the interests of other states in maintaining sovereignty within their own territories.

VI. EVEN IF THE DISTRICT COURT HAD JURISDICTION UNDER THE SHERMAN ACT TO HEAR THESE CLAIMS, INTERNATIONAL LAW AS EMBODIED IN U.S. LAW REQUIRES THAT IT REFRAIN FROM DOING SO.

A. A Direct Conflict of Law Poses a Fundamental Jurisdictional Issue and Cannot be "Balanced."

Where two sovereign states assert concurrent conflicting jurisdiction over the same conduct, it is not a question of mere politeness between two states. As a jurisdictional issue, conflicts of law should not be "weighed" or "balanced" against other national or international interests. Too often, as in the decision below, the result is virtually predetermined.[16] As this Court recognized in *McCulloch v. Sociedad Nacional*, 372 U.S. 10, 19 (1963), adopting a "balancing" test under such circumstances "would project the courts into application of the sanctions of the Act to foreign-flag ships on a purely ad hoc weighing of contacts basis" and "would inevitably lead to embarrassment in foreign affairs and be entirely infeasible in actual practice."[17] This Court

16. *See* James R. Atwood & Kingman Brewster, *Antitrust and American Business Abroad* 166 (2d ed. 1981). Conflicts between the laws of nations should be "an integral part of the jurisdictional issue." The "bulk of international scholarship historically treated comity as a qualification on the scope of a state's legislative jurisdiction." *Id.* National courts should not undermine the regulatory framework or policies of foreign sovereigns within their territory. *See e.g.* Address by the then Australian Attorney-General Senator Peter Durack, Q.C. to the American Bar Association, 12 August 1981, "Australia: 'Extraterritorial Application of United States Law,'" *reprinted in*, Lowe, *Extraterritorial Jurisdiction*, 90, 94 (1983) ("But it is not merely that the court lacks the expertise; it is rather that it is not part of the judicial function to decide whether a law or policy is justified by what a court conceives to be in the national interest.").

17. Judicial balancing of interest and contacts is a time tested method for resolving conflicts of laws where jurisdiction is concurrent but not conflicting,

should reject the Ninth Circuit's balancing test as applied here, as it rejected the balancing test of the National Labor Relations Board in *McCulloch*. *Id*.

B. At A Minimum, Sovereign Regulatory Conflicts Must be Accorded Substantially Greater Weight Than Other Factors in a Conflict of Laws Balancing.

Even if The Territorial Preference in a sovereign jurisdictional conflict were to be balanced against other factors, however, it should be accorded substantially greater weight than it was accorded by the Ninth Circuit. The one case in which the Supreme Court has balanced conflicting sovereign interests was *Société Internationale Pour Participations Industrielles et Commerciales v. Rogers*, 357 U.S. 197, 212 (1958). There, in contrast to this case, the Court unquestionably had jurisdiction; indeed, the foreign party was the plaintiff. The issue was whether the district court could dismiss the plaintiff's claim based on a failure to produce documents whose production was prohibited by the law of Switzerland, the foreign state in which the documents were located. The Court applied The Territorial Preference and refrained from coercing foreign discovery as the price of maintaining the U.S. suit. If The Territorial Preference is theoretically open to balancing, the rationale of *Rogers* should restrict the exercise of extraterritorial jurisdiction in this case.

CONCLUSION

This Court has consistently applied principles of United States and international law to limit claims by private parties and executive officials that they are free to apply U.S. law abroad, in spite of the consequences to other sovereign states within their

or where one forum is less convenient than the other. It has not succeeded where it has been used to override The Territorial Preference. Because sovereign conflict balancing is inappropriate where basic subject matter jurisdiction is at issue does not mean that U.S. courts should be free, absent clear legislative expression, to ignore The Territorial Preference and simply assert jurisdiction. Canada notes that, in *Laker Airways v. Sabena, Belgium World Airlines*, 731 F.2d 909, 948–950 (D.C. Cir. 1984), the court failed to consider the precedents cited herein; in Canada's view, the result in that case was not in accordance with U.S. and customary international law.

territories. This Court has, until now, required a clear expression of Congressional authorization for such enforcement before approving it. Nothing in the Sherman Act, as amended, authorizes a departure from this tradition. This case provides a rare and important opportunity to reaffirm, in this modern day of unprecedented and increasing global interdependence, the strong and continuing connection between United States and international law in addressing international jurisdictional conflicts.

Accordingly, the judgement of the Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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